IN THE JUSTICE OF THE PEACE COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY
COURT NO. 17

COURT ADDRESS:
23730 SHORTLY ROAD
GEORGETOWN DE 19947

CIVIL ACTION NO: JP17-11-000960

TUNNELL COMPANIES LP VS MICHAEL G MACKLEY II

SYSTEM ID: 000962
STEPHEN P ELLIS
ELLIS & SZABO
9 NORTH FRONT STREET
P.O. BOX 574
GEORGETOWN DE 19947

NOTICE OF JUDGMENT/ORDER

The Court has entered a judgment or order in the following form:

This summary possession action was filed against the defendant by Tunnell Companies LP on February 18, 2011, seeking unpaid rent, late fees, accruing rent, possession and court costs. In its complaint the company also sought an administrative fee associated with filing the action. The original trial was scheduled for March 10, 2011, at which time Tunnell moved for a default judgment, as the defendant failed to appear. The Court conducted a hearing pursuant to 10 Del. C. §9537 to determine the basis for the default and found that the required notices included a demand for the administrative fee, thus inflating the demand in the notice and rendering it invalid for purposes of obtaining the judgment. Tunnell appealed pursuant to 25 Del. C. §5717, and this three judge panel was constituted. The Court convened the trial de novo on April 11, 2011. Again, the defendant failed to appear and the court inquired into the basis for the request for a default judgment pursuant to 10 Del. C. §9537. Testimony by Tunnell's community manager and argument by counsel for Tunnell centered on the question of whether the administrative fee is permissible. This is the panel's decision on the application for a default judgment. For the reasons stated herein, the motion for a default judgment is granted in part and denied in part.

Tunnell has shown by a preponderance of the evidence that rent remains unpaid despite appropriate demand notices dated January 7, 2011 and February 8, 2011. The wording of the demand for the administrative fee in the required notice letters is such that it does not defeat the notice for purposes of obtaining possession and a judgment for past due rent, late fees and accruing rent. The demand notices do not claim the administrative fee as additional rent, which may improperly inflate the demand if such a fee is otherwise impermissible. As such, the Court will award possession to Tunnell and award the appropriate monetary damages in the statement of the judgment below.

This leaves only the question of the administrative fee and whether such a fee is permissible. Considering the facts of this case and the analysis below, we find that a fee charged for the sole purpose of recovering administrative costs associated with the filing of suit is impermissible.

The provisions of 25 Del. C. §7008 govern the application of fees in the manufactured home community context. That section states, in pertinent part:

(a) A "fee" or "charge" is a monetary obligation, other than lot rent, designated in a fee schedule pursuant to subsection (b) of this section and assessed by a landlord to a tenant for a service furnished to the tenant, or for an expense incurred as a direct result of the tenant's use of the premises or of the tenant's acts or omissions. A fee or charge may be considered as rent for purposes of termination of a rental agreement, summary possession proceedings or for other purposes if specified in this title.

(b) A landlord must clearly disclose all fees in a fee schedule attached to each rental agreement.

(c) A landlord may assess a fee if the fee relates to a service furnished to a tenant or to an expense incurred as a direct result of the tenant's use of the premises. However, a fee that is assessed due to the tenant's failure to perform a duty arising under the rental agreement may be assessed only after the landlord notifies the tenant of the failure and allows the tenant 5 days after notification to remedy or correct the failure to perform. A tenant's failure to pay the fee within .5 days[1] of notification is a basis for termination of the rental agreement pursuant to § 7010A of this title.

Fees and charges, other than late fees for past due rent, are required to be disclosed in the rental agreement as required by 25 Del. C. §7006(a)(6), which states that a rental agreement must contain, "a listing of each other fee or charge in a manner that identifies the service to be provided for the fee or charge in accordance with the provisions of §7008 of this title". Subparagraph (9) of that same section also requires a services rider be attached to the rental agreement, indicating the, "utility, facility [or] service provided by the landlord and available to the tenant, clearly indicating … the fees and charges that may be imposed upon the tenant by the landlord." These fees and charges are defined under 25 Del. C. §7003(17) and §7008(a) as additional rent for purposes of seeking summary possession.

Fees may be charged for services rendered by the landlord and received by the tenant. They may also be recovered for an expense incurred by the landlord as a direct result of the tenant's use of the premises. Finally, they can be imposed for the tenant's acts or omissions. Those acts or omissions constituting a failure to perform a duty under the rental agreement require the landlord to provide notice and five days for the tenant to cure the defect.

Tunnell has clearly complied with the necessary procedural provision that would make a fee effective. The company has published the existence of the administrative fee for the filing of suit in its fee schedule attached to the tenant's lease agreement. That fee schedule is attached to this decision and incorporated herein by reference. It is also clear that the triggering event for the administrative fee has taken place: suit has been filed for failure of the tenant to comply with a lease obligation – the failure to pay rent. On its face it would seem that this is a permissible fee, provided all of those requirements have been met. However, there are four determinative reasons that this particular fee will not fit into the statutory framework governing this case. First, when this statute is read in conjunction with the other statutory notice provisions relating to the most prevalent underlying reasons for triggering the administrative fee there is no meaningful notice or opportunity to cure available to the tenant as required under the statute. Second, such a fee impermissibly limits the right of the tenant to access the Court for a defense. Third, this administrative fee is unlike any other contemplated in the governing statutory scheme and a remedy at law for the act triggering the fee already exists in most cases. Finally,

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[1] The published version of the Code text, in both book form and online, state ".5 days" at this point in the statute. This initially appeared to the Court to be a typographical error, but examination of the legislative history of this section now leads the Court to believe that a lonely, misplaced period survived an amendment of the original bill. This fact alone could lead the Court to find that there is an ambiguity in the statute, but, for purposes of this decision, the Court will assume that the Code Revisors simply missed this error and the period should not be present. The Court will determine this case based on its merits rather than a technical error. Nothing in this decision should be construed to limit a future challenge of this statute based solely on this clear error in the statute text.

this particular fee may be used as a method to avoid the overriding proscription on attorney's fees contained in the Code.

Lack of Meaningful Notice and Opportunity to Cure

In landlord-tenant law, it is well settled that the statutory provisions regarding notice must be followed strictly. The essence of such notice is that it affords the tenant a meaningful opportunity to cure any defect within the applicable notice period before any subsequent action is taken by the landlord to seek appropriate redress. Only after the notice period has expired, without appropriate action from the tenant, may the landlord proceed with the corrective action permitted under the Code.

In the case of a fee for failure to abide by the terms of the rental agreement, §7008 requires five days notice to the tenant of the condition precipitating the notice. Within those five days the tenant must cure the delinquency or face the consequence of the fee. For instance, if the tenant has failed to abide by a rule of the community by not cutting grass on the rental property, after notice the tenant has five days to cut the grass before the landlord may cut the grass and charge the tenant for that obligation.

The Code provides other, specific, notice requirements for omissions of the tenant under the rental agreement prior to the landlord being permitted to file an action for possession. The two most applicable to the case at bar are the seven day notice for failure to pay rent and the twelve day notice for failure to abide by a rule or condition of the agreement.[2] Notably, these are the two most common reasons for the filing of a summary possession action of the eleven grounds specifically permitted pursuant to 25 Del. C. §5702. Nearly every case brought to the Court for possession will require one or more of these notices.

This framework gives cause for concern about charging an administrative fee for filing suit because the notice is not the same for either of the most likely underlying precipitating actions. Since there are conflicting notice requirements, even were such an administrative fee generally permissible, it could only be charged after the passage of time statutorily required for the underlying omission on the part of the tenant. If the landlord only provided the five days required by §7008, either the landlord would be in violation of the other notice provisions if suit was filed early or there would be a period of two to 7 days where there was no meaningful opportunity for the tenant to cure prior to the imposition of the fee. To be in compliance with the other notice requirements the landlord would have to provide seven days notice for administrative fees associated with rental violations and twelve days notice for those imposed for suits brought for rules violations.[3]

It is inconceivable to the Court that the legislature would impose a system of notices that intentionally conflict in such a significant way. Tunnell's position would have the Court accept that landlords and tenants would have to be sufficiently savvy to understand that the five day notice provision clearly stated in the statute only applies in some cases and not in others, and that, in those cases where it does not apply, it is variable according to other provisions of the law not related to the imposition of fees. This is a position clearly at odds with the stated intent of the legislature to "clarify and establish the law governing the rental of lots for manufactured homes as well as the rights and obligations" of both home owners and community owners.[4]

Denial of Court Access

The second reason this particular fee fails is that it impermissibly limits the right of the tenant to access the Court for consideration of a defense to the action alleged by the landlord to have been the cause of the need to file suit. It simultaneously limits the tenant's only recourse to paying the demand.

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[2] Those notices are provided for in the Code at §7010A(b)(3) and (2), respectively.

[3] In this instance, it is noteworthy that the landlord provided seven days notice of the late rent and informed the tenant of the imposition of the fee if suit was subsequently filed.

[4] 25 Del.C. §7001(a)(1).

Section 7008 provides that the landlord may terminate the agreement under §7010A for failure of the tenant to pay the fee within the five day notice period. The statute sets up a situation where the tenant, on proper notice, must remedy the breach of the rental agreement or pay the fee associated with the breach. If the tenant also fails to pay the fee, the landlord may seek to terminate the agreement on that basis as well and seek possession of the lot.

This situation works fine for breaches such as the prior example of failure to cut the grass in violation of the rules. This is a discernable fact – either the grass is within its standard for the community or it is not. The tenant can either cut the grass or pay the fee within the five days. If the tenant does neither, he or she is subject to suit for possession – either for failure to cut the grass (after 12 days notice) or for failure to pay the fee.

In the case of the fee for filing suit, however, the tenant has no such choices, especially in the case where the tenant has a superior defense to the suit. Consider an instance where a tenant receives notice from the landlord that rent is delinquent; landlord gives notice of the imposition of the fee if suit is filed. The tenant has receipts to show that rent was paid that landlord disputes. The tenant must now pay rent a second time or pay a fee for the pleasure of being sued to prove the defense of original payment. If the tenant fails to pay the fee, then absurdity results – the landlord may then have permissible grounds to seek possession (failure to pay the fee timely) in a case where the original grounds for the action were not permissible. In either event, the effect of the fee is to chill the right of the tenant to seek redress from the court in stark contrast to the guarantees contained in 25 Del. C. §7006(b).[5]

Unique Nature of Fee for Filing Suit

The third deficiency of this administrative fee is that the legislature has established a statutory framework within which a stand-alone fee for filing a court action simply does not fit comfortably. There are already specific fees available to community owners within the Code for various violations of the rental agreement. Where a tenant has failed to pay for a utility and the landlord assumes the responsibility, the landlord may charge a fee of the greater of 5% of the total payment to the utility or $25.[6] The community owner may charge a late fee of 5% or $25, whichever is greater, for rent more than five days past due so long as the late fee provision is contained in the rental agreement.[7]

There are also provisions specifically indicating a preference for fees for service. Fee for service is the most common fee to be expected in agreements of this sort. Fee for service is referenced in §7006(a)(6) and (9). It is also dealt with in §7008(a), (c), (g), (h) and (l). It is clear that the legislature contemplated that most fees would result in some sort of service for the tenant, and those that do not must be uniquely relevant to the conditions related to the occupancy of a manufactured house lot.

This can be seen even more clearly when you contrast the fees section in the Residential Landlord-Tenant Code with the Manufactured Community act. In the landlord-tenant code, it is absolutely clear that only fees for "actual service rendered" are permitted.[8] The fees section for the manufactured housing code takes into account the unique nature of living in an operating a manufactured home community and expands the list of permissible fees to allow for the landlord to impose some level of community conformity and cohesion. Where a tenant diverges significantly from that expected standard, the landlord can take action to remedy the situation and charge for that additional service or charge a fee with the expectation that it will obtain compliance before the fee becomes effective. This is consistent with the stated intent of the General Assembly in §7001, in that

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[5] Note that these are not the circumstances before the Court. The Court does not believe that the intention of this particular landlord is to create such a situation. The Court is merely observing that the structure of the statute itself is ripe for such abuse.

[6] 25 Del. C. §7008(e).

[7] 25 Del. C. §7006(b)(6).

[8] 25 Del. C. §5311.

one of the purposes of the subchapter, the provisions of which must be "liberally construed and applied to promote", is to "encourage manufactured home community owners and manufactured home owners and residents to maintain and improve the quality of life in manufactured home communities."[9]

Looking at the promulgated fee list of Tunnell provides a further understanding of what the provisions of the statutory scheme were most logically intended to address. All other charges in the Tunnell list deal with fee for an additional service (boat slip, etc.), statutorily permitted punitive fee (late rent), fee for a metered utility, or a fee for remedy of a breach of the rules requiring an additional service by the landlord (grass cutting, etc.). This administrative fee for the filing of a suit one stands alone as a fee for an act that does not result in any benefit for the home owner, bring the lot back into conformity with the community standard, or address a penalty specifically permitted by statute.

There is nothing unique to the manufactured home context about the necessity of filing suit to remove tenants who do not abide by the rental agreement. This is a cost of doing business, presumably already calculated into the rental amount for all tenants. As the Superior Court noted in MHC Financing v. Brady[10] the landlord may consider any number of factors, including "real estate property taxes and other costs of doing business when it contemplates the proper amount of the lot's actual rent." The landlord has a right to raise rent once a year to accommodate all manner of things that affect the cost of maintaining the community and employing the resources needed to continue to make it run.[11]

Considering the facts that give rise to this specific case, there is an additional remedy already available for a landlord, of which Tunnell has taken advantage – the statutorily authorized late rent fee. While the Code does not specifically define what this fee is intended to accomplish, it is reasonable to presume that the late fee is a measure providing incentive to ensure prompt payment of rent and to compensate the landlord for the additional costs of attempting to collect delinquent rent. Allowing an additional administrative fee for the filing of an action in such a situation would constitute a surplus boon for the landlord.

Impermissible Recovery of Representation Fees

The final reason that an administrative fee for filing an action in court is not allowable is that it may constitute a means to circumvent a clear prohibition on attorney fees.[12] In the §9537 hearing before the panel, counsel for Tunnell was asked whether there was any limit on this administrative fee, assuming that it was properly noticed to the tenant. Counsel conceded that there did not appear to be any restraint on the amount that could be charged for any fee under this provision. While Tunnell's fee is certainly small enough to be considered reasonable in this instance, an unscrupulous landlord could impose a substantial sum for this fee and use the proceeds to cover the costs of counsel. Such an act would clearly be contrary to the established law. To allow even a partial recovery would be contrary to the intent of the prohibition.

Furthermore, Tunnell is typically represented in this Court by a representative authorized under Supreme Court Rule 57 – a so-called "Form 50 representative." These persons are granted a temporary and limited right to practice law in the Justice of the Peace Court for the purpose of representing an artificial entity. These non-lawyers are not permitted to be engaged in fee for legal services arrangements, as evidenced by the fact that they cannot be employed for the primary purpose of bringing or defending actions in the Justice of the Peace Court.[13] Again, recovery of legal fees – even those engaged in the authorized limited practice of law - is not permissible. If this fee is intended to cover the administrative costs of bringing an action, those costs presumably include the cost of having the Form 50 representative acting on behalf of the entity.

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[9] 25 Del. C. §7001(a)(2)
[10] MHC v. Brady, 2003 WL 22064096 (Del. Super.)
[11] 25 Del. C. §7021.
[12] See 25 Del.C. §7006(b)(14) and 25 Del. C. §5111.
[13] Delaware Supreme Court Rule 57(c)(3)(d)

For all of the above reasons, both independently and considered in their sum, this Court finds that a fee for the purpose of covering the administrative costs of filing suit against a manufactured home community resident is impermissible. No such administrative fee, in any amount, would comply with the statutory framework set forth for these landlord-tenant relationships. Therefore, Tunnell's application for the administrative fee is denied.

Judgment is entered in favor of Tunnell for possession of the lot, a monetary judgment in the amount of $2,840.25 for past due rent to April 25, 2011, per diem rent of $23.82 until regaining possession, late fees totaling $144.92, plus court costs of $41.50.

IT IS SO ORDERED this 25th day of April, 2011

/s/ Sheila Blakely
/s/ John C Martin
/s/ Alan G Davis (SEAL)
Justice of the Peace/Court Official

NOTICE OF APPEAL RIGHTS

Any party has 15 days starting the day after the judgment is signed by the judge to appeal the judgment of the Justice of the Peace Court to the Court of Common Pleas of the above county. If the judgment involves an action for summary possession in a landlord/tenant case, then either party has 5 business days, starting the day after the judgment is signed by the judge, to appeal the judgment to a three judge panel at the Justice of the Peace Court where the judgment was ordered. You must complete all of the appeal requirements within those periods. To prevent dismissal, the appeal must name all of the parties as they were originally named in the Justice of the Peace Court action. (This applies even if the action was dismissed in the Justice of the Peace Court against one or more of the parties.) Additional information on appeal procedures is found in the attached sheet entitled "Justice of the Peace Courts Civil Post-Judgment Procedures". (J.P. Civ. Form No. 14A) If no appeal is filed, parties may remove all exhibits from the Court no sooner than 16 days and no later than 30 days, from the date of this judgment. If not removed, the Court may dispose of the exhibits without further notice to the parties.

Final Date of Appeal of a Civil Case to the Court of Common Pleas is 15 days from the judgment.

Final Date for Appeal of a Landlord/Tenant case to a 3 Judge Panel is 5 days from the judgment.

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COURT ADDRESS:
23730 SHORTLY ROAD
GEORGETOWN DE 19947

CIVIL ACTION NO: JP17-11-000960

TUNNELL COMPANIES LP, PLAINTIFF
VS
MICHAEL G MACKLEY II, DEFENDANT

Plaintiff Parties:
PLAINTIFF
SYSTEM ID: @2944
TUNNELL COMPANIES LP
34026 ANNA'S WAY
SUITE 1
LONG NECK, DE 19966

ATTORNEY FOR PLAINTIFF
SYSTEM ID: 000962
STEPHEN P ELLIS
ELLIS & SZABO
9 NORTH FRONT STREET
P.O. BOX 574
GEORGETOWN, DE 19947

Defendant Parties:
DEFENDANT
SYSTEM ID: @2270742
MICHAEL G MACKLEY II.
POT NETS BAYSIDE
34431 MALLARD ROAD
LONG NECK, DE 19966

DEFENDANT
SYSTEM ID: @2270742
MICHAEL G MACKLEY II.
34431 (497) MALLARD ROAD
POT-NETS BAYSIDE
LONG NECK, DE 19966

Other Case Parties:
AGENT
SYSTEM ID: FA1405
SHEILA A MORROW
C/O TUNNELL COMPANIES LP
34026 ANNA'S WAY, STE 1
LONG NECK, DE 19966